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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32549 (Sub-No. 23)

BURLINGTON NORTHERN INC. AND
BURLINGTON NORTHERN RAILROAD COMPANY
–CONTROL AND MERGER–
SANTA FE PACIFIC CORPORATION AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
(Arbitration Review)

Decided: September 23, 2002

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a petition for review[1] of an arbitration award (the Award) entered by an Arbitration Panel (the Panel) chaired by neutral member Robert Peterson.[2] We decline to review the Award.

BACKGROUND

In a decision served August 23, 1995, the Interstate Commerce Commission (ICC or Commission), our predecessor, approved the acquisition of control of Santa Fe Pacific Corporation by Burlington Northern Inc. The ICC also approved the common control and merger of Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (ATSF).[3] The Commission imposed the standard New York Dock conditions for the protection of

[1] Appeals of arbitration decisions are permitted under 49 CFR 1115.8.

[2] BNSF also requests a waiver of the 30-page limit prescribed in 49 CFR 1115.2(d) and 1115.8. The request is unopposed and, as the submitted material will assist us in reaching a more informed decision, it will be granted.

[3] Burlington Northern, et al. — Merger — Santa Fe Pacific, et al., 10 I.C.C.2d 661 (1995) (BNSF Merger).

employees[4] on its approval of both the acquisition and the merger. Under New York Dock, changes affecting rail employees and related to approved transactions must be implemented by agreements negotiated before the changes occur. If the parties cannot reach agreement or if they disagree on the interpretation of an implementing agreement, the issues are resolved by arbitration, subject to appeal to the agency under our deferential Lace Curtain standard of review.[5]

In accordance with New York Dock, BNSF and the United Transportation Union (UTU) entered into implementing agreements for all but two changes. The parties disagreed over the substantive labor protections that applied to employees on extended runs from Kansas City, MO, to Galesburg, IL, and from Amarillo, TX, to Enid, OK. The railroad and the union submitted the resolution of these two matters to arbitration.

Before the Panel, UTU argued that these runs were "interdivisional service changes" covered by the January 1972 National Agreement, Article XIII labor protection provision, as embodied in the 1985 National Agreement (National Agreement). Therefore, according to UTU, employees adversely affected by the changes have recourse to that existing collective bargaining agreement (CBA), not the New York Dock conditions.[6] BNSF argued that these runs were unavailable to the separate carriers before the merger and, as such, were inter-railroad changes covered by the imposed New York Dock conditions. In its July 21, 2001 Award, the Panel found that the runs at issue were interdivisional service changes,[7] that the National Agreement protections applied,[8] and that it was not necessary to override the agreement to achieve the transportation benefits of the transaction.

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[4] See New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

[5] Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. IBEW v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

[6] The main difference in employee protection appears to be that the National Agreement provisions may cover affected employees beyond the New York Dock period of 6 years, "equal to the length of time which such employee has seniority in the craft or class at the time he is adversely affected." See National Agreement, Art. XIII, Section (1)(d). It was for that reason that affected employees here preferred the National Agreement protections over the New York Dock protections.

[7] See Award at 11.

[8] See Award at 14.

On August 10, 2001, BNSF filed its petition for review. UTU filed a reply on August 30, 2001. On October 9, 2001, BNSF filed a motion to strike portions of UTU's reply. UTU opposed this motion in a reply filed on October 17, 2001.

PRELIMINARY MATTER

BNSF seeks to strike three sentences from UTU's reply on grounds that they are incorrect and clear misrepresentations and misstatements of the record.[9] UTU argues in reply that BNSF's motion is untimely under 49 CFR 1104.13(a) and is an impermissible reply to a reply under 49 CFR 1104.13(c). Further, UTU disputes BNSF's characterization of its statements.

The motion to strike will be denied. The three statements to which BNSF objects do not purport to be statements of fact but, rather, constitute argument and characterization of the record. BNSF may fairly dispute them, but the railroad's disagreement with their import is not a reason to strike them from the record. BNSF's objections go to the weight to be accorded the statements rather than to their admissibility. Accordingly, the motion to strike will be denied.[10]

DISCUSSION AND CONCLUSIONS

The scope of our review of arbitral rulings interpreting and applying our New York Dock labor conditions is limited. Under Lace Curtain, we generally defer to an arbitration panel's decision and limit our review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions."[11] We generally will not overturn an arbitral award unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions, or that

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[9] The three sentences are footnote 3, second sentence; page 13, first paragraph, the second to the last sentence; and page 17, first paragraph, the second to the last sentence.

[10] We also agree with UTU that BNSF's motion to strike is untimely. Our rules, at 49 CFR 1104.13(a), provide that a party may file a reply or motion addressed to a pleading within 20 days after that pleading has been filed with the Board. BNSF, however, did not file its motion until 40 days after UTU filed its reply, and gave no reason for filing late. Further, BNSF's motion is clearly an attempt to reply to a reply, disputing assertions made by UTU in its filing. Such replies are impermissible under 49 CFR 1104.13(c).

[11] Lace Curtain at 735-36.

it exceeds the authority reposed in the arbitrators by those conditions.[12] We are particularly deferential to findings of fact made by arbitrators, setting them aside only when shown to constitute egregious error. We employ these limited standards of review in deference to the arbitrator's competence in this area and special role in resolving labor disputes.[13] Thus, our analysis here focuses on whether BNSF has met its burden of proof under these criteria.

BNSF argues that Board review of the Award is appropriate here because the Award cannot be said to draw its essence from New York Dock, reflects egregious error, and exceeds the authority reposed in the arbitrators. Petitioner further asserts that its petition raises an issue of general importance regarding the interpretation of agency labor protective conditions. In this instance, petitioner asserts, the Panel has abrogated and overridden the substantive New York Dock labor conditions imposed by the ICC in BNSF Merger and replaced them with inapplicable National Agreement terms.[14]

UTU counters that the Panel correctly found: (1) that the provisions of the National Agreement applied to the runs in dispute and to affected employees; and (2) that no need existed to override that prior collective bargaining agreement (CBA) in the circumstances here. UTU asserts that BNSF has failed to satisfy any of the relevant criteria for Lace Curtain review. This dispute, UTU contends, is a garden variety matter routinely handled by New York Dock arbitration panels and does not require review by the Board. UTU adds that, even if the issues involved were of sufficient significance to warrant review, BNSF seeks review of the Panel's findings of fact, which are accorded the greatest deference by the Board under Lace Curtain. Finally, UTU contends that New York Dock contemplates that existing CBAs be given effect unless an override is necessary to implement the

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[12] Delaware and Hudson Railway-Lease and Trackage Rights Exemption-Springfield Terminal Railway, Finance Docket No. 30965 (Sub-No. 1) (ICC served Oct. 4, 1990), remanded on other grounds sub nom. Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir 1993).

[13] Norfolk and Western Railway Company, Southern Railway Company and Interstate Railroad Company – Exemption – Contract to Operate and Trackage Rights (Arbitration Review), Docket No. 30582 (Sub-No. 2) (ICC served July 7, 1989).

[14] According to petitioner, the National Agreement only covers intra-railroad district changes by individual carriers; it is not a vehicle for consolidating or otherwise achieving the inter-railroad operations and merger-driven changes that, it argues, are involved here. Petitioner further points out that the ICC, in BNSF Merger, addressed the union's arguments in favor of enhanced protection and rejected them in imposing New York Dock. BNSF views UTU's actions here as a backdoor attempt to secure those enhanced protections.

transaction and to secure transportation benefits to the public[15] and that no such need has been shown here. For these reasons, UTU argues that the Board should decline to review this Award.

We find no basis under Lace Curtain to review this Award and decline to do so. First, we reject BNSF's claim that the Board must review the Award because it implicates "recurring or otherwise significant issues." In this case, the Panel looked to see if a specific prior CBA, the National Agreement, applied to employees affected by certain specific operational changes. Finding that it did, the Panel then determined that the CBA could be given effect without depriving the public of the transportation benefits of the acquisition or preventing BNSF from implementing the proposed operational changes. The Panel's action here in interpreting a CBA is the kind of task in which arbitrators routinely engage and does not present an issue of general importance regarding the interpretation of our labor conditions.[16]

Nor has BNSF shown that the Panel's findings reflect egregious error or that the Award is irrational. While the Panel agreed with the carrier's position that the National Agreement does not apply to inter-railroad operations, the Panel found that the changes at issue were, in fact, interdivisional changes of an existing railroad, ATSF.[17] This is a factual finding to which we accord great deference under our Lace Curtain standards. Those who, like BNSF, ask us to overturn the findings of an arbitral

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[15] UTU cites Fox Valley & Western Ltd. – Exemption Acquisition and Operation – Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation and the Ahnapee & Western Railway Company (Arbitration Review), Finance Docket No. 32035 (Sub-Nos. 2-6) (ICC served Aug. 10, 1995), slip op. at 2-3 .

[16] See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company–Control and Merger–Southern Pacific Rail Corporation, et al. (Petition for Enforcement of Arbitration Award), STB Finance Docket No. 32760 (Sub-No. 37) (STB served Aug. 16, 2000).

[17] In so doing, the Panel pointed to the carrier's notice to institute the changes which contemplated "applying the Santa Fe schedule and full rights for all crews to do all permissible work at all points along the run," and to the fact that, although the Commission decision gave the carriers the authority to merge, they elected to remain, at least for a time, separate corporate entities, both held by a newly created holding company. Award at 11. These facts are consistent with the Panel's finding that the changes were interdivisional.

panel carry a heavy evidentiary burden to show why we must do so. Petitioner has not met that burden here.[18]

Further, BNSF has not shown that the Panel, having found these changes to be interdivisional in nature, acted irrationally in applying the existing UTU National Agreement to the changes. The Board or arbitrators acting under the New York Dock conditions may override provisions of existing CBAs only when an override is necessary to carry out an approved transaction and to achieve public transportation benefits.[19] Here, the Panel found that application of a prior CBA was not an impediment to the transaction because the CBA does not bar the operational changes BNSF proposed but, rather, simply provides greater employee protection than the New York Dock conditions. BNSF has not demonstrated on this record that the application of the CBA would prevent the intended transportation benefits of the transaction. As such, we find that BNSF has not met its burden of proof.

We also reject BNSF's assertion that the Award did not draw its essence from New York Dock. To the contrary, the Award was made pursuant to New York Dock procedures. In particular, Article I, Section 3, of the New York Dock conditions embodies the concept that agency-imposed protective arrangements do not always supersede pre-existing protective agreements. That provision further provides that an employee may make an election between the provisions of New York Dock and any other applicable protective agreement. In this case, consistent with New York Dock, the Panel interpreted the prior CBA, found that it applied to the issue runs, and concluded that affected employees could properly choose the CBA protections over the New York Dock protections.[20]

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[18] BNSF's petition echoes the dissenting opinion to the Award which argued that, because the subject runs were new and involved new crew district assignments, there were no prior agreements applicable to any employees post-merger and, therefore, no already protected employees. But the petition, like the dissent, fails to adequately address how the operational changes at issue affected any employees other than those of the Santa Fe.

[19] Norfolk & W. Rwy. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 127-28 (1991); Swonger v. STB, 265 F.3d 1135, 1141 (10th Cir. 2001); United Transportation Union v. STB, 108 F.3d 1425, 1427 (D.C. Cir. 1997); CSX Corp. — Control — Chessie System, Inc. et al., 3 S.T.B. 701, 720 (1998).

[20] We also find meritless BNSF's argument that the ICC's rejection of enhanced labor protection in lieu of New York Dock protection, in its 1995 decision, bars the Panel's actions here and prevents us from affirming those actions. The ICC imposed New York Dock protections as a floor, finding that no need for enhanced protection had been shown on that record. But the ICC did not rule out the possibility that employees might be eligible for greater protection based on a prior agreement.

(continued...)

Finally, we find no merit in BNSF's allegations that the Panel improperly overrode our New York Dock conditions and thereby exceeded the scope of its authority. As discussed above, the Panel did not abrogate or override the imposed New York Dock conditions. Instead, it interpreted the National Agreement and found that it was not necessary to abrogate that agreement in order to implement the transaction.[21] Such a determination is a matter well within the expertise of arbitrators.[22]

In sum, the arbitral award is facially reasonable. BNSF has failed to demonstrate otherwise or to make any of the required showings under the Lace Curtain standard of review. As such, we decline to review the Award.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF'S request for waiver of the page limit is granted.

2. BNSF's motion to strike is denied.

3. The petition for review is denied.

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[20](...continued)
Indeed, the ICC had clearly indicated that such questions would be resolved in future negotiations or arbitrations. See BNSF Merger at 760. In any event, as discussed, the Panel's actions here were made pursuant to New York Dock provisions, not in abrogation thereof.

[21] Arbitrators acting pursuant to the New York Dock conditions are given wide latitude to forge implementing agreements based on their expertise and may also, when necessary, draw on bargaining agreements in effect before a merger. See Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, et al. (Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 22) (STB served June 26, 1997), slip op. at 5 & n.7 (UP/SP (Sub-No. 22) June 26, 1997 decision) and cases cited therein.

[22] See, e.g., UP/SP (Sub-No. 22) June 26, 1997 decision, slip op. at 3.

4. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary